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Lawyers' Argumentation Skills: A Comparison between Criminal and Civil Cases

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Abstract

The present research examined the argumentation skills that Egyptian lawyers use in courtrooms, and whether these skills differ by litigation type. Using content analysis of a sample consisted of 94 written pleadings, results indicated that Egyptian lawyers used many different argumentation skills in courtrooms in order to present their evidence or interpret the opponent's evidence. In addition, the results indicated that these skills differed by litigation type. The results and tits implications were discussed in light of previous studies.

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1. Introduction

The present study attempts to assess Egyptian lawyers' argumentation skills using a sample of their legal writing compared to the types and levels of argumentation skills revealed by previous studies (Shehata & Shawki, 2002; Shawki & Shehata, 2003). In recent years, legal theorists have come to regard argumentation as a topic of great interest, and different approaches to legal reasoning have been described (Bertea, 2004). At the same time, argumentation skills have become the focus of studies from different perspectives in psychology (Glassner, Weinstock & Neuman, 2005), and cognitive psychologists have begun to take an empirical approach towards argumentation (Wolfe, 2011). From

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this standpoint, an argument is, at minimum, a claim supported by a reason (Wolfe, Britt & Butler, 2009). This definition is comparable with the "data" in Toulmin's (1958) terms.

In the law, argumentation plays an important role when someone presents a legal claim and wishes to be accepted by others. A lawyer who brings a case to court must justify his or her case with arguments (Feteris, 1997) by using reasoning to get his partner in dialogue to become committed to a proposition to which he was not committed to at the beginning of the dialogue (Moulin, Irandoust, Belangeri & Desbordes, 2002).

Argumentation can be defined as a verbal, social, and rational activity aimed at convincing a reasonable critic of the acceptability of a standpoint by putting forth a constellation of one or more propositions to justify this standpoint. This definition does not only refer to the activity of advancing arguments, but also to the shorter or longer text that result from it. Argumentation relates both to the process of putting forth argumentation and to its "product," and the term argumentation covers the two of them (Emeren, Grootendorst & Henkeman, 2002). In the argumentation theory, argumentation is viewed not only as the product of a rational process of reasoning, but also as part of a developing communication and interaction process (Emeren et al., 2002). The lawyer cares a great deal about finding the truth, but he also cares about winning his client's case. As such, he uses language, reason, and rhetorical tools aimed at persuading others to believe his position (Clements, 2013).

Argumentation can be a formal demonstration of the truth of a proposition, but in law, this formal demonstration is often not possible. In such domains, rationality must be based on some more or less informal arguments. Informal arguments are not always spelled out and immediately visible, and must sometimes be made explicit by analysis (Mochales & Moens, 2011). Psychology has a long tradition of studying non-logical aspects of argumentation. For example, studies have shown that simple repetition of an idea is often a more effective method of argumentation than are appeals to reason. Empirical studies of communicator credibility and attractiveness have also been closely tied to empirically-occurring arguments. Such studies bring argumentation within the ambit of persuasion theory and practice (Mochales & Moens, 2011).

Persuasion changes the action of the one persuaded because his or her basic beliefs and thoughts on a subject are changed by what is seen or heard. True persuasion, unlike manipulation, does not entail a person reluctantly overcoming misgivings in order to agree with the manipulator for reasons of their own. The point is that the lawyer's use of persuasion does not necessarily involve trying to bend other people's wills to his own, but rather involves getting others to see things the way he sees them. This, perhaps, distinguishes a lawyer's use of persuasion from manipulative persuasion (Clements, 2013).

Arguing against someone else's standpoint can be used to refute all those who oppose one's position. Objections to particular arguments can be raised in at least three ways: by directly attacking the opponent's statements or claims, by putting forth counter-statements or counter-claims, and by highlighting and contrasting the arguments in the two sets of statements or claims (Ilie, 2009). Claims can be refuted when experience, testimony, authority, or common knowledge contradicts them. Apart from considerable background and specialised knowledge, refuting an argument requires critical thinking skills, strong purposefulness and genuine personal commitment (Ilie, 2009).

In Egyptian society, previous research results indicated that contextual factors, such as the cultural context (Shehata & Shawki, 2002) and expertise of lawyer (Abdullah, 2006) play a critical role in individual differences between arguers, compared to demographic factors such as age, gender (Shawki, 2000) and creative abilities (Abdel Gawad, 2011). The litigation type, which is the aim of interest of the current research, is a contextual factor in the Egyptian legal system, where the experience of lawyer varies, depending on the documents in civil cases. But, there is more space to convince the judge in criminal cases.

The 215-225 articles of Egyptian procedures law define judicial system in Egypt depends on principle of litigation on two degrees, where that it is a right to convicted party to appeal against the judgments of first-degree courts, the dispute shall be put in front of second-degree courts again to take a decision un the final judgment. The court consists in each degree from two courts, civil and criminal. Similar criminal with a civil crime in being the unlawful acts, but the illegitimacy of the criminal offense derives its origin from principle "no crime or punishment except by law", while the source of the illegitimacy of civil crime act is Article 163 civilians, which stipulates "each error cause harm to others; perpetrator is committed to compensation".

There are differences between the two types of cases both at bring a claim or it's proven or makes a judgment, to file a claim, the differences are:

1. The criminal case related to the whole community, there for, public prosecutor to initiate criminal proceedings as a representative of the community while civil lawsuit related to only the injured party.
2. Litigants in criminal proceeding are public prosecutor and the accused while opponents in the civil suit are injured party and the accused.
3. The criminal case brought before the criminal courts, which is ruled punishment or precautionary measures, while the civil suit brought before the civil courts is governed by the compensation.
4. may waive civil action at any stage until after the issuance of a final judgment in which, while may not be assigned the criminal case as they relate to the interests of society, but in some of the crimes which exempted the law of this rule, a crime which does not trigger the only complaint or request such as adultery and libel.
5. In the criminal case does not judge the penalty, but the perpetrator himself when found guilty, while in the civil case, the basic principle is the rule for compensation on the same defendant, but it is possible to govern compensation for other.

To prove a case, the differences are: the proofing in criminal cases is responsibility of public prosecutor, whilst in civil proceedings falls on the litigants, criminal Judge has absolute discretion in assessing the evidences and weighting them according to the principle of freedom of proof in criminal matters, whereas civil judge is restricted as defined by the law of evidence, the civil judge is limited when he balances between evidences, while the criminal judge has widen more in the way of his quest for the expert to ask of his own to provide any evidence it deems useful in the lawsuit, and an evidentiary link is required in criminal proceedings, meaning that the judge who initiated the proceedings; refuted the evidence and attended the pleadings is the same verdict in this case, while this is not required in civil proceedings.

Many studies have been conducted to teach law students fundamental lawyering skills (e.g., Bliss & Chinvinijkul, 2014). Other studies concerned lawyers' courtroom language, which focused on the questioning of witnesses (Tracy & Robles, 2009). However, few studies have examined the processes by which lawyers present evidence or interpret the opponent's evidence to the jury. Taylor (2000) conducted a study in which law students argued three cutting-edge Indian taxation cases in a simulated courtroom setting and practitioner lawyers served as judges. Results indicated that students honed their oral advocacy skills and moot court experience stimulated them to discuss cases before and after the arguments, continued thinking, rethinking and re-evaluation helped them to reach a high level of expertise.

Hobbs (2003) examined a lawyer's use of her persuasive skills in the process of 'summation', the arguments of counsel presented at the close of evidence, prior to the jury's deliberations. Through the analysis of a segment of the prosecutor's rebuttal argument in a criminal case, the author indicated that lawyers use impression management to construct a shared identity with jurors in order to persuade them to affiliate with the lawyer's point of view, and demonstrated how rhetorical style is used to construct this shared identity.

In a local study, Abdullah (2006) indicated that there were differences between the performance of lawyers according to years of experience in the dimension of Argumentation Behavior Scale. Experienced lawyers had higher scores in contextual control, questioning, argumentative assertion, directing the argument trace, ensure understanding, argumentative wisdom, argument partition, reconstructing, analogy, and intellectual exhaustion.

2. Current study

Few studies have examined the processes that lawyers use to present their evidence or interpret the opponent's evidence to the jury. These processes can be better understood by examining lawyers' legal writing for different cases. The present research examined lawyers' argumentation skills using a sample of their legal writing. The study assessed (a) the argumentation skills that Egyptian lawyers use in courtrooms to present their evidence or interpret the opponent's evidence to the jury, and (b) whether these argumentation skills differ by litigation type.

3. Method

3.1 Sample

The sample consisted of 94 written pleadings (48 civil cases: Rescind a contract, indemnity and redemption; and 46 criminal cases: murder, hitting, forgery, theft and harassment), presented during 2003–2012 to courts at: Cairo, Asuot, Banha and Mansoura by 25 experienced (15- 30 years) Egyptian male lawyers.

3.2 Procedures

A content analysis was performed on this sample of lawyers' pleading skills. The authors used the idea as a unit *of* analysis. A coding manual was developed by the authors that defined the presence of the idea in the text even once (1) compared to non-existent (0). The authors depended on the argumentation components' scale, which consists of 95 items that are rated on five – point scales, with answer options ranging from 'always to rarely'. These items distributed on 28 components which represent argumentation skills, The reliability and validity of the scale are well documented, and each of the scale`s components presents an idea or a unit of analysis in the present study table 1 (Shawki & Shehata, 2003; Shehata & Shawki, 2002).

Inter-rater reliability was calculated in order to determine the amount of agreement between the coders (number of codes agreed upon/total number of codes made). The percentage of agreement was 0.82, which was corrected for chance agreement with the kappa statistic (Viera & Garrett, 2005). Kappa was 0.73.Table 1

Table 1. Argumentation components scale and examples from civil and criminal cases for each component

Components	Examples
1. Citation and documentation to strengthen the argument	Quote a text of the Bible; or rule of law; or Supreme Court or aphorism.
2. Investigating the argument accuracy.	Refute the statements of witnesses to highlight opposition to his testimony for common sense.
3. Contextual control.	Showing the context that led to coerced confession.
4. Contradiction detecting.	Between the two reports to highlight the absence of proof.
5. Questioning.	Highlighting the prevalence of the offense and the lack of knowledge of the facts.
6. Be drawn.	Highlighting the prevalence of offense and lack knowledge about the facts.
7. Provocation.	Exaggeration of the offence.
8. Argumentative terror.	Highlighting the judge`s errors in similar cases.
9. Dispersion.	Speaking about secondary issues stem from the main case.
10. Evasion (mystification).	Using of ambiguous words.
11. Argumentative assertion.	Asking for justifications.
12. Directing the argument trace.	Directing the evidence to someone other than the defendant.
13. Ensure understanding.	Using expert witnesses.
14. Argumentative wisdom.	Avoid angering the judge.
15. Argument partition.	Split the case to parts and each part to elements and refute each of them.
16. Examining the relations between phenomena.	Showing the sequence of actions to highlight the absence of criminal intent.
17. Generalization control.	Avoid giving absolute judgments.
18. Arguments control and arrangement.	Arguments arrangement from the weakest to the strongest and highlight the weakness of the Attorney`s argument.
19. Listing positive and negative arguments.	Listing the supporting and the non-supporting arguments, and comparing between them. Rearrangement of facts, including the facts that highlight the usual act.
20. Reconstructing arguments.	Providing sentences early or providing it late to suggest a different sense.
21. Argumentative creation.	Reporting similar stories of the incident.
22. Analogy.	Comparing the case facts with another one which the judgment was issued in favor of the suspect.
23. Make comparisons.	Asking many questions to explain what is self-evident.
24. Intellectual exhaustion.	Making reason as a result.
25. Reverse inference.	Showing acceptance of the idea and using the evidence to dismiss the case.
26. Flattery.	

27.	Incapacitate (weakening).	Making objections and displaying multiple alternatives that is difficult to accept any of them.
28.	Highlighting the positive aspects.	Highlighting the advantages resulting from a particular provision of the judge.

4. Results

Table2 presents the frequencies of argumentation skills that have been used by lawyers in different cases.

According to Table 1, the results indicate that Egyptian lawyers use many argumentation skills in courtrooms in order to present their evidence or refute the opponent's evidence. The most frequently used argumentation skills by lawyers were citation and documentation in order to strengthen the argument (66%), questioning (29.7%), contextual control and contradiction detecting (27.6%), argument partition (25.6%), examining the relationship between phenomena (9.5%), making comparisons (8.5%), argumentative wisdom (6.3%), being drawn (5.3%), directing the argument trace (4.2%), argument control and arrangement (3.1%), and evasion (mystification) (2.1%).

In addition, the results indicated that some argumentation skills had been used more frequently in criminal cases in comparison to civil cases, such as contextual control, contradiction detecting, questioning, and making comparisons ($Z= 3.45, 4.42, 3.93, 2.63, p < .05$), respectively.

Table 2
Frequencies and percentage of argumentation skills used by Egyptian lawyers

		Civil cases (n=48)		Criminal cases (n=46)		Total cases	
		Frequencies	%	Frequencies	%	Frequencies	%
1.	Citation and documentation to strengthen the argument	35	73	27	58.7	62	66
2.	Investigating the argument accuracy.	1	2.1			1	1
3.	Contextual control.	6	12.5	20	43.5	26	27.6
4.	Contradiction detecting.	4	8.3	22	47.8	26	27.6
5.	Questioning.	8	16.7	20	43.5	28	29.7
6.	Be drawn.	1	2.1	4	8.7	5	5.3
7.	Provocation.						
8.	Argumentative terror.						
9.	Dispersion.			2	4.4	2	2.1
10.	Evasion (mystification).						
11.	Argumentative assertion.			1	2.2	1	1
12.	Directing the argument trace.	1	2.1	3	6.5	4	4.2
13.	Ensure understanding.						
14.	Argumentative wisdom.	6	12.5			6	6.3
15.	Argument partition.	10	20.8	15	32.6	25	25.6
16.	Examining the relations between phenomena.	2	4.2	7	15.3	9	9.5
17.	Generalization control.						
18.	Arguments control and arrangement.			3	6.5	3	3.1
19.	Listing positive and negative arguments.						
20.	Reconstructing arguments.	1	2.1			1	1
21.	Argumentative creation.						

22.	Analogy.						
23.	Make comparisons.	1	2.1	7	15.3	8	8.5
24.	Intellectual exhaustion.						
25.	Reverse inference.						
26.	Flattery.						
27.	Incapacitate (weakening).						
28.	Highlighting the positive aspects.						

5. Discussion

The results revealed that the components most commonly used among Egyptian lawyers that reflect the skills of superficial logic like citation, revealed the discrepancy, observed the context, questioned and dissected the argument. While components are less common which reflect the skills of assertiveness such as be drawn, prevarication and organize argument. The Egyptian lawyers did not use components that reflect higher mental abilities, such as ensuring understanding, listing the positive and negative arguments, argument arrangement, analogies, making comparisons, flattery, incapacitating (weakening) and highlighting the positive aspects. This is probably due to the practices of Egyptian lawyers that may be based on common sense and tradition (newest lawyer shadowing an older one), rather than depending on the production of evidence; it is largely based on intuitive and informal reasoning and a lack of formal principles of logic (Zurek, 2012). This way may be acceptable when dealing with civil cases that depend on documents, but it is not acceptable when dealing with criminal cases where there is an urgent need to convince the judge. Nevertheless, the Egyptian lawyers use same argumentation components in both of these types of cases, except for contextual control, contradiction detecting, questioning, and making comparisons.

The implications of these findings are as follows. First, it refers to the need to make training programs for Egyptian lawyers, either during their schooling or periodically during the time where they are practicing their legal profession. In order to narrow the gap between education and practice, the Egyptian law association (Bar Association) should introduce practical education. In addition, law colleges should have faculty members with practical experience to provide their students with a flexible mentality. This point is important where, until the 18th century, an important place in a lawyer's training was reserved for education in reasoning about the rules or principles of law. This reasoning was indeed understood more as rhetoric, as the art of the orator, and as the capacity to exercise persuasion. Nonetheless, the less pragmatic and more formal aspect of legal discourse was not neglected. Treatises on "legal logic" burgeoned, generally, though not only, as applications of Aristotelian logic to the structure of the arguments used in legal disputes.

Second, the results of this study illustrate the need to restructure Egyptian legal education in order to enhance justice by developing argumentation skills. So, focusing on argumentative practice is needed. The argumentation in the legal realm is very unique. It brings together arguments by professionals and lay people as well as different standards of what counts as a good reason. (Hannken- Ikkjes , 2006), especially with any case that does not appear as a set of facts, but rather as a story told by a client. The lawyer must first interpret this story, in the correct context, so that it can be made to fit the framework of applicable law. Once an interpretation has been selected, the argument must be organized into the form considered most likely to persuade, both to advocate the client's position and to rebut anticipated objections. Then, to be applicable to a new case, however, the extracted rule may need to be analogized or transformed to match the new facts.

Extracting the rationale is also not straightforward: judges often leave their reasoning implicit and in reconstructing the rationale, a judge could have had in his or her mind that there may be several candidate rationales, and they can be expressed at a variety of levels of abstraction (Bench-Capon; Prakken & Sartor, 2009). The concept of field-dependence of argumentation can be one contribution to this endeavor. Framing it by using an ethnographic approach can offer a deep understanding of the social practice in the field where argumentation is just a part – an understanding that is central to the analysis of argumentative practice.

This kind of analysis can, in turn, lead to a comprehensive description of the production of legal rationality in criminal proceedings (Hannken-Ikkjes, 2006). Second, variables other than the litigation type may be related to the acquisition of professional skills. It is important that future research that compares argumentation skills between males

and females lawyers, between oral and written pleadings, and between lawyers, public prosecutors and judges observe whether or not their pleadings exhibit similar skills to those found in the current study.

There are some important limitations in the current study. First, it depended on an unrepresented and limited number of written advocacies. Another potential limitation of this study is that it examined lawyers' written argumentation and ignored questioning in a courtroom or oral argument between lawyers and judges. The explicit purpose of an oral argument is to help judges sort through the voluminous arguments raised in litigant and amicus curiae briefs so that the court can arrive at a decision and craft an opinion on the disputed issue (Tracy & Robles, 2009). As a result, future research should examine lawyers' oral arguments.

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